United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1364

To be argued by
RICHARD H. KUH

B P/S

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

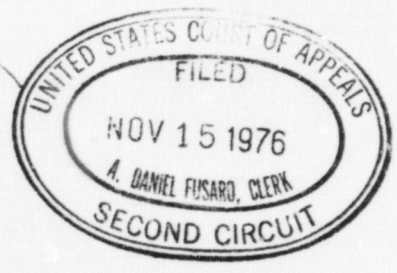
—against—

EDWARD PASTOR and MARTIN WEINER,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT PASTOR



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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v. : 76 - 1364

EDWARD PASTOR and MARTIN WEINER,

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On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR APPELLANT PASTOR

PRELIMINARY STATEMENT

Edward Pastor appeals from a judgment of the United States District Court for the Southern District of New York, rendered September 17, 1976, (Hon. Constance Baker Motley, District Judge, and a jury), convicting him of two counts of unlawfully obtaining possession of controlled substances (21 U.S.C. §843(a)(3)) and one count of conspiracy to violate 21 U.S.C. §§812, 841(a) and 843(a) and sentencing him to six months imprisonment and a fine of $5,000 on the conspiracy conviction and suspended sentences of four years imprisonment on each of

the two substantive counts. Execution of sentence has been stayed pending appeal.

ISSUES PRESENTED

1. Did impanelling the jury while Pastor was involuntarily absent violate his constitutional and statutory rights?
2. Is the delegation of power to the nation's chief law enforcement official to define crimes and ordain their punishment, under impossibly vague standards and without any pretense at compliance, unconstitutional as violative of the doctrine of separation of powers and due process?
3. Was venue improperly laid in the Southern District?

STATEMENT OF THE CASE

Pretrial Proceedings

On July 31, 1975, Edward Pastor and Martin Weiner, pharmacists in the Philadelphia, Pennsylvania metropolitan area, were indicted by a Grand Jury impanelled in the Southern District of New York, and charged with four counts of unlawfully obtaining by fraud and deception various quantities of phendimetrazine, a Schedule III controlled substance and

phentermine, a Schedule IV controlled substance, under 21 U.S.C. §843(a)(3) of the Federal Drug Abuse Prevention and Control Act of 1970, and one count of conspiracy (Ind. 75 Cr. 753). After lengthy pretrial motions were made, answered and ruled upon, trial was scheduled for February 17, 1976.

Six days prior to trial, the Government filed a new, superseding indictment (Ind. 76 Cr. 145) charging an additional substantive violation as well as making eleven other changes of substance. The defendants orally moved to dismiss this indictment on the ground that the Grand Jury had been presented with hearsay evidence in violation of this Court's decision in United States v. Estepa, 471 F.2d 1132 (1972).* The court granted the motion in a decision dated February 19, 1976, finding that the Assistant United States Attorney who presented the evidence to the Grand Jury unwittingly deceived that body "as to the shoddy merchandise it was getting," effectively made it a "rubber stamp," failed to advise it of the hearsay quality of the evidence and, in effect, deprived the defendants of their right to impeachment material.

* Actually, this first superseding indictment (76 Cr. 145) was filed on Wednesday, February 11, 1976. The next five days prior to trial included a weekend and a public holiday. On February 20, a "no true bill" in connection with Pastor was filed. A second superseding indictment (76 Cr. 253), identical to the first superseding indictment, and upon which the charges were finally tried, was filed on March 12, 1976. In all, then, four different presentations were made to Grand Juries by the Government in regard to this case.

At the same time, pursuant to defendant Pastor's motion, the court commenced a hearing on February 17, 1976, to determine whether Pastor's heart condition, the seriousness of which was never disputed, and the heavy medication to which he was regularly subjected, rendered him incapable of standing trial.*

Indeed, on the previous day, February 16, 1976, Pastor was brought in by stretcher to the Coronary Care Unit of Hahnemann Hospital, in his home city of Philadelphia, suffering from congestive heart failure and acute myocardial infarction (A305). This condition was confirmed by Dr. Meyer Texon, a physician selected by the Government, who examined Pastor in that hospital on February 21, 1976, found that he had suffered

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*Pastor was first hospitalized in 1966 for seven weeks for an acute myocardial infarction. He sustained two more attacks the following year. From 1967 to 1973, he continued to manifest symptoms of coronary insufficiency. In 1974, when angina attacks became more severe and another myocardial infarction was considered imminent, he was hospitalized again. After discharge, Pastor was treated for hypertensive cardiovascular disease and hypertension. On September 11, 1975, Pastor was again hospitalized as an emergency case due to unstable crescendo coronary insufficiency. Electrocardiograms revealed severe coronary artery disease;and further tests, including coronary catheterization, showed complete occlusion of the right coronary artery, partial occlusion of the left coronary artery, and evidence of severe damage to the left ventricle. According to Dr. Gaddo Onesti, Professor of Medicine at Hahnemann Medical College and Hospital in Philadelphia, which information was brought to the court's attention, Pastor's diagnosis as of September 25, 1975, was "advanced, irreversible coronary artery disease with crescendo angina and impending myocardial infarction with severe myocardial insufficiency. The prognosis is extremely serious" (A288). (References preceded by "A" refer to the pages in the Appellants' Appendix; references preceded by "T" refer to pages in the trial transcript).

congestive heart failure, and recommended continued hospitalization for an additional seven to ten days. The trial was adjourned to May 17, 1976.

A few days before the re-scheduled trial, Dr. Leslie Kuhn,* a physician selected by Pastor, and Dr. Texon, re-examined Pastor, the former concluding in a report dated May 12 that Pastor's participation in his trial at that time would pose a serious and even life-threatening risk, the latter concluding in a report dated May 10, that while chest pain might be expected, a myocardial infarction was unlikely. Based on these reports, the court concluded in an opinion dated May 14, 1976, that further hearings were unnecessary, that the trial would proceed as scheduled for four hours daily with necessary recesses to permit Pastor to take his medication, and with frequent examinations by Dr. Texon (A278).

Commencement of the Trial

At 9:00 a.m. on May 17th, a hearing commenced into the admissibility of statements Pastor purportedly made to an agent of the Drug Enforcement Administration (A 312). At the conclusion of the morning session, the court adjourned to the following day, stating that the hearing would be concluded after a jury was impanelled (A 312).

* Dr. Kuhn is the Director of the Ames Coronary Care Unit at Mount Sinai Hospital.

At the commencement of the trial at 9:00 a.m. on May 18th, Pastor's counsel informed Judge Motley that Pastor had been stricken ill that morning, had been administered oxygen by his wife, that Dr. Texon had been notified and asked to examine Pastor but had refused on the ground that he was not authorized by the court to do so (A 320-1). The following colloquy then occurred:

> "MR. COOPER (Pastor's counsel): I would ask that the Court through a phone call at least now order Dr. Texon to examine Mr. Pastor at Mr. Pastor's hotel.
>
> "THE COURT: I don't have any doctor's certificate here, Mr. Cooper, saying that Mr. Pastor is unable to attend court this morning, so his bail is revoked and the United States Marshals are ordered now to go and get him. We are going to proceed in his absence" (A155).*

The Government's application that jury selection be deferred was summarily denied by the court (A323), as was defense counsel's application for one hour's continuance to obtain a medical certificate (A324). Although having absolutely no knowledge or information as to Pastor's physical condition, Judge Motley characterized his absence as "a deliberate

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*It is noteworthy that at a scheduling conference held a week earlier, in a response to defense counsel's request that every medical precaution be taken in the unforeseen event that Mr. Pastor be stricken in the courtroom, the court assured counsel that proper precautions would be taken, adding with reference to Pastor: "This is not the first defendan who has claimed to have a heart attack" (Transcript of May 13, 1976, at 22) (emphasis added).

attempt to frustrate this court in bringing this case to trial" (A324).*

Over defense counsel's objection, as well as the Government's objection (A156-7) a jury and two alternates were selected and sworn in Pastor's absence (A327-8).

An application was made by Pastor's counsel later that morning that in view of Dr. Kuhn's affidavit submitted to the

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*In an affidavit dated May 18, 1976 and submitted to the court that morning, Dr. Kuhn stated that he had examined Mr. Pastor at the emergency room of Mt. Sinai Hospital at 10:00 a.m. on May 18, 1976. According to Dr. Kuhn, Pastor had suffered that morning two hours of "crushing anterior chest pain" unrelieved by substantial medication of Nitroglycerine and morphine. Upon examination, Dr. Kuhn found Pastor in "severe distress" with symptoms of acute myocardial ischemia not present in earlier examinations. He found that Pastor was suffering from "severe acute myocardial ischemia with possible acute myocardial infarction or impending acute myocardial infarction." Dr. Kuhn hospitalized Pastor for observation and treatment in the Coronary Care Unit (A310).

Later that afternoon, pursuant to Judge Motley's express direction, Federal Marshals removed Pastor from the heart-monitoring equipment in the Coronary Care Unit at Mt. Sinai Hospital and brought him under oxygen, by ambulance, to the Metropolitan Correctional Center, near the District Courthouse. Subsequently, after some delay, Judge Motley authorized Pastor's return to Mt. Sinai Hospital.

In a supplementary affidavit dated May 19, 1976 and submitted to the court on May 20, 1976, Dr. Kuhn stated that since his hospitalization, Pastor sustained severe chest pain indicating inadequate blood flow into the heart muscle. Electrocardiographic abnormalities did not respond to oral medication and required injections of pain relieving drugs. Dr. Kuhn felt Pastor was subject to imminent acute myocardial infarction and that his participation in the trial created a serious hazard to his health (A311).

court certifying to Pastor's illness, that the court reconsider its decision revoking bail and ordering Pastor's arrest. The application was categorically rejected, the court demonstrating pique that its earlier order to the marshals had been ignored:

> "THE COURT: .....(N)obody obeyed that order and I had to during the course of the selection of the jury get the chief marshal to go and get him. That order was completely ignored. I gave that order at 9:10 this morning. If it was obeyed, he would be there now.
>
> "MR. COOPER: Your honor, I believe it is the fault---
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> "THE COURT: This was due to people disobeying my orders in this case. My responsibility is to see that the authority of this court is not undermined by anybody, and it's consistently being done by the defendants in this case. That is my view.
>
> I said it earlier this morning, that this case was a deliberate attempt to frustrate the Court.." (A343-4).

After additional colloquy, including a vigorous exchange between defense counsel and the court (A351-5), Judge Motley adjourned the proceedings to the following day, May 19, before which time Dr. Texon was to have examined Pastor and reported his findings to the court. While Dr. Texon found no evidence of myocardial infarction based upon that intervening examination, he found that Pastor indeed had suffered an episode of coronary insufficiency and myocardial ischemia. Dr. Texon also noticed changes in the precordial leads in the electrocardiogram, ex-

tremely severe chest pains relieved only by morphine injections, with a more severely developed angina and myocardial ischemia. Dr. Texon felt Pastor should remain in the coronary unit at least another day, after which time further re-evaluation should be made (A360-2).*

Again on May 19, the court denied counsel's application to reinstate Pastor's bail, suggesting that Pastor be incarcerated either at the Metropolitan Correctional Center -- "one of the newest and finest detention centers in the United States," according to the court -- or, if Pastor chose, "to stay at his expense in Mount Sinai Hospital under guard" (A382-3) (emphasis added).**

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*Pastor remained in the Coronary Care Unit until May 25, 1976, when he was transferred to a private room (T 1126).

**Understandably, the medical advice dictated that Pastor remain at Mt. Sinai Hospital. During the remainder of the proceedings, he was taken each day by Federal Marshals from the Hospital to court, being disconnected from the heart-monitoring machinery for that part of the time he was in coronary care.

Throughout the trial, the effects of Pastor's illness continually marked the proceedings. For instance, Pastor's medication required him frequently to leave the courtroom in the jury's presence in the custody of Marshals to go to the bathroom (T247, T446, T1540); Pastor was chastised by the court for taking his medication while the jury was present (T297-8); although the court initially stated that it would hold proceedings for four hours each day, the court later changed its mind and decided to hold hearings in the afternoon, regardless of whether Pastor was physically able to attend (T385-6, T547-8); there were recurring indications that the medication being taken by Pastor rendered him totally unconscious for portions of the proceedings (T441-50, T851-6); during the trial period, upon examining Pastor, Dr. Texon found liquid in his lungs, a precursor of congestive heart failure (T1044).

The Evidence at Trial

The Government's proof consisted principally of testimony from an alleged co-conspirator, Charles P. Fernald, regarding several transactions involving controlled substances (phendimetrazine and phentermine) with defendants Pastor and Weiner, and of documentary evidence establishing Fernald's role as an intermediary with drug companies in these transactions. The Government also introduced two statements Pastor purportedly made to an agent of the Drug Enforcement Administration and a witness who identified Pastor as the recipient of packages allegedly containing the contraband.

Fernald was president of a drug distribution corporation (Wingate) between 1972 and 1974 (T398-9). He became a government informant in the fall of 1973 after having been prosecuted for conspiracy to sell controlled substances (T404, T1185-6).*

In April, 1973, Fernald was told by Douglas Berry, a customer agent of his, that a pharmacist in Philadelphia named Edward Pastor was interested in obtaining large quantities of

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*Fernald testified that even though he agreed to cooperate, he had no understanding with the Government as to the consequences of his cooperation (T1186-90). Moreover, although he commenced cooperating with the Government at a time when he was deeply involved in illegal transactions with Pastor and Weiner, he never apprised the Government of these ongoing transactions (T1215).

anorectic drugs (T428). A meeting was arranged in Philadelphia in May, 1973, between Fernald, Pastor and Weiner, at which time Fernald sold them a package of the as yet uncontrolled substance, phendimetrazine, and arrangements were made about future transactions (T474-5). Pastor indicated that he was not interested in receiving invoices or signing receipts, and that he would always pay promptly either by certified check or cash (T435, T437-8). At Berry's instructions, Fernald made out the sales invoice in the name of Dr. Horace Johnson (T437). Indeed, Fernald had previously used Dr. Johnson's name to conceal sales of controlled substances in cases unrelated to Pastor and Weiner, but could not remember any specific transaction (T1032-3).*

Twice in June, 1973, Fernald delivered quantities of phendimetrazine to Pastor in Philadelphia (T462, T479) and Weiner in New York (T485), with invoices sent in the first transaction to Dr. Horace Johnson and in the second, at Berry's instruction, to Tri-State pharmacies owned by Weiner (T488-9).

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*Dr. Horace Johnson testified that his license to purchase controlled substances had expired on December 31, 1972 and had not been renewed (T1274; c.f., T1238). He was a good friend of Pastor's and had sent him business (T1286-7). Johnson never asked Pastor to order controlled substances for him and never received any of the drugs shown in invoices introduced as Government exhibits at trial (T1288-9).

Pursuant to their arrangement, on July 26, 1973, Fernald delivered 100,000 phendimetrazine capsules from his own inventory to Pastor at the latter's apartment in Philadelphia, the invoice mailed to Dr. Johnson (T493-7) Payment was received by Fernald on August 3 (T496). This transaction constituted Count II of the indictment.

The next transaction took place in the late summer of 1973, and involved the delivery by Fernald to Pastor in Philadelphia of two million phendimetrazine tablets (T500-03). The invoice, sent to Dr. Johnson, was predated by Fernald to June 1, 1973, owing to the latter's concern over the imposition of controls on the drug on June 15 (T500-01, T505; c.f., T278). Fernald received payment over a period of time (T507). This transaction constituted Count III of the indictment.

According to Fernald, in arranging future transactions, Pastor gave Fernald Dr. Johnson's BNDD (Bureau of Narcotics and Dangerous Drugs) registration number since the drug was now subject to controls (T508, T510, T512, T706).

The next transaction, at Fernald's instigation, was arranged in October, 1973, for 250,000 phentimetrazine capsules. Fernald placed the order with Vitarine Company, a Queens drug manufacturer, and the drugs were shipped to Dr. Johnson in care of Edward Pastor (T700, T702, T706). Fernald received payment

in cash from Pastor on October 22, 1973 in the latter's Philadelphia residence (T707-08). This transaction constituted Count IV of the indictment.

For future deliveries, Fernald advised Pastor that Vitarine wanted a letter from Dr. Johnson ordering the drugs (T712-13). Pastor sent Fernald such a letter ordering 200,000 phendimetrazine capsules per month for six months; Fernald retained the original and mailed a copy to Vitarine (T714-16).* These shipments were made monthly from Vitarine to Philadelphia (T722, T728, T734, T743, T762); payments were all made to Fernald in Philadelphia either by Pastor (T724, T730-01) or Weiner (T736, T744, T764). This transaction constituted Count V of the indictment.

Finally, in April, 1974, Pastor ordered from Fernald one million phentermine capsules (T748-9). Fernald placed the order with Vitarine, again notifying Pastor that he would need a letter from Dr. Johnson similar to the last one, which Pastor provided (T750). Shipments were made to Pastor in Philadelphia, where Fernald received payment (T754-5, T759-60). This transaction constituted Count VI of the indictment.

Edward Gallagher, a manager of a Philadelphia transport company, recalled two occasions when he was telephoned by a Dr.

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*Dr. Johnson testified that he never wrote such a letter and never authorized anybody to do so (T1289-92).

Johnson in connection with deliveries of drugs, followed thereafter by that individual's appearance to pick up the drugs (T1643, T1648-51, T1656). Gallagher identified Pastor as the individual who represented himself to be Dr. Johnson (T1657).*

Joseph Vigna, a special agent with the Drug Enforcement Administration, interviewed Pastor on December 9, 1974 and February 26, 1975. He testified that Pastor admitted "diverting" drugs and sharing profits from their sales (T1798-1801). Vigna acknowledged that prior to speaking to Pastor, he served him with a Grand Jury subpoena, was aware that Pastor had recently been hospitalized for a heart condition, that Pastor tired easily, that he moved and spoke slowly, and that he was taking medication (T1805-06, T1825-6, T1833). Pastor was a target of the Government's investigation, but Vigna never told him that (T1807). Nor did Vigna apprise Pastor that "we generally arrest all the people we have under

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*Gallagher's in-court identification of Pastor was attacked as totally unreliable and inadmissible as a result of wholly improper photographic procedures used by the Government. During a hearing on the issue, it was established that some six months after the incidents testified to, Gallagher provided a federal agent with a general description of the individual in question, after which this agent showed Gallagher a single photograph of Pastor on two separate occasions (Gallagher, T1483, T1485; Crow T1450, T1453). The court found (T1513-22) that although the showing of the single photograph was prejudicial ("in many if not most instances, such a practice would be so prejudicial as to merit suppression"), the totality of the circumstances -- i.e., the length of time Gallagher saw the individual and the

investigation" an assertion he testified to at trial (T1829). On the other hand, Vigna did tell Pastor that he "didn't want to hear any denials from him and if that was his purpose that I really wasn't interested and we could terminate the interview now" (T614, T1821-2).**

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unique surrounding circumstances -- was such as to provide the witness with an independent basis to make an accurate in-court identification (Opinion of the court, September 20, 1976).

**A hearing was held on the admissibility of Pastor's statements. Contrary to the sworn, "self-serving" testimony of the Government witnesses, the court found that no warnings were given to Pastor pursuant to Miranda v. Arizona, 384 U.S. 436 (1966) (Opinion of September 20, 1976, 3-5). However, in accord with the recent decision of the Supreme Court in Beckwith v. United States, _____U.S._____, 48 L.Ed.2d 1 (1976), the court found that Pastor "was not in a custodial situation," and that his statements were voluntarily made. Id. at 6-7.

ARGUMENT

POINT I

Impanelling the jury while Pastor was involuntarily absent violated his constitutional and statutory rights and by itself mandates reversal of his conviction.

It was undisputed that when his trial commenced on May 18, 1976, Edward Pastor was genuinely a very sick man. He had a ten-year history of severe heart illness, had suffered several heart attacks, and as recently as February, 1976, had sustained a congestive heart failure. His condition was diagnosed as serious not only by his own medical expert, Dr. Leslie Kuhn, but also by the Government's expert, Dr. Meyer Texon, their only basic difference of opinion being whether the emotional stress of a courtroom proceeding would reasonably threaten Pastor's life. A hearing was conducted on May 17 in Pastor's presence, and the trial was scheduled to commence the following morning (A312).

At 9 o'clock on the morning of May 18, Pastor's counsel advised the court that his client had been stricken ill earlier that morning, was administered oxygen by his wife, and that the Government's physician had been notified in order to certify to the genuineness of Pastor's illness, as, of course, he later did (A320-1, A360-2). Only the week before, in the face of

massive and incontestable evidence of Pastor's condition, the court belittled his illness, remarking: "This is not the first defendant who has claimed to have a heart attack." Rather than calmly appraising the situation, the court dismissed appeals to reason by both the defense and the Government (A323-4), ordering Federal Marshals to arrest Pastor, and then impetuously directing the impanellment of a jury in Pastor's absence (A322-8). By so acting, the trial court violated fundamental concepts of decency, fairness and morality as well as constitutional and statutory safeguards insuring an accused's right to a fair trial.*

It is today an elementary principle of constitutional jurisprudence that a defendant must be allowed to be present at every stage of his trial, unless he voluntarily relinquishes that right. Illinois v. Allen, 397 U.S. 337 (1970); Snyder v. Massachusetts, 291 U.S. 97 (1934); Diaz v. United States, 223

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*It should be noted that on the following day, May 19, counsel for Pastor made it emphatically clear to Judge Motley that he did not waive the defendant's right to be present at the impanellment of the jury. Counsel stated, "I will make it clear now we move for a mistrial. There will be no claim of double jeopardy that the defendant wasn't here during the jury selection, and we, therefore, move for a mistrial" (A402). The court denied the motion (A404).

U.S. 442 (1912); United States v. Toliver, _____F.2d_____ (2d Cir. Sept. 2, 1976); United States v. Crutcher, 405 F.2d 239 (2d Cir. 1968), cert. denied, 394 U.S. 908 (1969).

Although early decisions of the Supreme Court appeared to construe a defendant's Sixth Amendment right to be present at every stage of his trial, and particularly the selection of the jury, as absolute and unwaivable (Lewis v. United States, 146 U.S. 37 (1892); Hopt v. Utah, 110 U.S. 574 (1884)), later decisions articulated the view that the right could be lost through consent or misconduct. Taylor v. United States, 414 U.S. 17 (1973); Illinois v. Allen, supra; Diaz v. United States, supra. Rule 43 of the Federal Rules of Criminal Procedure is a codification of these principles (Taylor v. United States, supra, at 18-19),and "is designed primarily to insure the defendant's presence, not to permit the trial to proceed in his absence." Wade v. United States, 441 F.2d 1046, 1048 (D.C. Cir. 1971). Moreover, "Courts must indulge every reasonable presumption against the loss of constitutional rights" (Illinois v. Allen, supra, at 343), and for a waiver of such rights to be effective, it must clearly be shown to have been "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

In several recent cases, this Court addressed the question of the propriety of a court's proceeding with trial in the defendant's absence. In Crutcher v. United States, supra, a jury was impanelled in the defendant's absence with his counsel's consent. The defendant's absence was found not to have been deliberate. This Court reversed the conviction on this ground alone, concluding that the defendant's absence during jury selection was so basic a right that it could not be considered a harmless error under the test laid down in Chapman v. California, 386 U.S. 18, 21 (1967). This Court observed at 244:

> "There is no way to assess the extent of the prejudice, if any, a defendant might suffer by not being able to advise his attorney during the impanelling of the jury.
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> * * *
>
> "...(W)e can only speculate as to what suggestions [the defendant] might or might not have made, since it would be his prerogative to challenge a juror simply on the basis of the 'sudden impressions and unaccountable prejudices we are apt to conveive upon the bare looks and gestures of another.' Lewis v. United States, supra, at 376". See also United States v. Chrisco, 493 F.2d 232, 237 (8th Cir. 1974), cert. denied, 419 U.S. 847 (1974).

On the other hand, in United States v. Tortora, 464 F.2d 1202 (2d Cir. 1972), cert. denied, 409 U.S. 1063

(1972), this Court affirmed a conviction, finding the defendant's absence to have been voluntary. In Tortora, five defendants were tried for federal extortion violations (18 U.S.C. §§ 892-94). Owing to difficulties in scheduling the trial because of other commitments of all the attorneys in the case, a firm date of August 10 was agreed upon. On that date, two defendants failed to appear in court, allegedly hospitalized due to illness. The District Court revoked their bail but did not proceed with the trial in their absence, adjourning the trial date to August 16. On that date, however, Santoro failed to appear, could not be located, and apparently absconded. Indeed, he was subsequently convicted of bail jumping. Id. at 1206, n. 3. Construing his absence as a voluntary waiver of his right to be present, the district judge proceeded with the trial in Santoro's absence. This Court agreed with that decision, holding that a trial may begin in a defendant's absence "if he deliberately absents himself without some sound reason for remaining away." Id. at 1208 (emphasis added).* Moreover,

*The Supreme Court expressed this "controlling rule" in

as this Court pointed out in Tortora, neither in the district court nor on appeal did Santoro ever offer any justification for his absence.

Indeed, even in a case of a deliberate and knowing failure to appear, hardly the case here, this Court cautioned trial judges against routinely proceeding with impanelling a jury except in cases involving "extraordinary circumstances" as were present in Tortora, i.e., "when the public interest clearly outweighs that of the voluntarily absent defendant." Id. at 1210. Factors to be considered in determining whether to commence the trial include the likelihood that the trial could take place soon with the defendant present, the difficulty of rescheduling the trial, particularly in multi-defendant trials, and the burden on the Government in undertaking two trials, again particularly in multi-defendant trials. From this reasoning this Court noted: "It is difficult to conceive of any case where the exercise of this discretion would be

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Taylor v. United States, supra, at 19, n. 3 in quoting Judge Fahy in Cureton v. United States, 396 F.2d 671, 676 (D.C. Cir. 1968):

> "(I)f a defendant at liberty remains away during his trial the court may proceed provided it is clearly established that his absence is voluntary. He must be aware of the processes taking place, of his right and of his obligation to be present, and he must have no sound reason for remaining away" (emphasis added).

appropriate other than a multiple-defendant case." Id. at 1210, n. 7. See also United States v. Toliver, supra, holding that even in cases of outright waiver, a "trial should not routinely proceed." Slip op., p. 5330. In Toliver also, while affirming the conviction, this Court, just two months ago, discussed in terms of the significance of the error those situations involving the defendant's absence during the selection of the jury from those cases of absence during other stages of the trial. This Court wrote (Slip op., pp. 5330-5331):

> "Although we indicated in United States v. Crutcher, 405 F.2d 239 (2d Cir. 1968), cert. denied, 394 U.S. 908 (1969), that a defendant's absence during the empanelling of a jury might be too basic to be treated as harmless, see also United States v. Clark, 475 F.2d 240, 247 (2d Cir. 1973), we did so on the ground that his absence during jury selection might prejudice him in ways impossible to determine on an appellate record, because it would deny him 'his prerogative to challenge a juror simply on the basis of the 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks or gestures of another.' 405 F.2d at 244, quoting Lewis v. United States, 146 U.S. 370, 376 (1892). This reasoning might justify a rule that would require automatic reversal when a defendant has been denied his right to participate in the jury selection process."

The lower court's summary determination here that the defendant's absence was deliberate was grievously wrong, impossible to justify, and automatically requiring reversal. "There certainly was not an escape or absconding of the de-

fendant" as might under certain extraordinary circumstances permit the trial to proceed. Wade v. United States, supra, at 1049; see also Taylor v. United States, supra; United States v. Tortora, supra; Government of Virgin Islands v. Brown, 507 F.2d 186 (3d Cir. 1975); United States v. Peterson, 524 F.2d 167 (4th Cir. 1975), cert. denied, 423 U.S. 1088 (1976). Here, as everybody knew, the defendant was present uptown in a hotel, soon to be carried by stretcher into the emergency Coronary Care Unit of Mt. Sinai Hospital where the Government's own selected physician recommended on the following day that Pastor remain for further examination (A362). Clearly, there was here a "sound reason" for the defendant's absence; he was genuinely ill, and nowhere in the record is there any contesting that inescapable fact. The District Court's decision to order Mr. Pastor jailed and to proceed in his absence, over defense counsel's and the Government's objection, would have constituted an abuse of discretion under the reasoning in Tortora even had there been some factual justification for the Court's determination. For here there were no extraordinary circumstances; there were only two defendants here, not five as in Tortora. It would hardly have been an undue burden on the Court to adjourn for a short period of time -- indeed, until the afternoon or for even an hour -- to determine the defendant's condition and the likelihood of commencing the

trial. The error is clear, prejudicial per se, and automatically requires reversal.

POINT II

The delegation of power to the nation's chief law enforcement official to define crimes and ordain their punishment, under impossibly vague standards and without any pretense at compliance, is unconstitutional as violative of the doctrine of separation of powers and Due Process.

In an omnibus motion dated January 2, 1976, addressed to indictment number 75 Cr.753(A17), Pastor challenged, inter alia, the constitutionality of the statute under which he was charged, contending that the provision in the Federal Drug Abuse Act of 1970 delegating to the Attorney General of the United States the power to declare certain conduct to be criminal -- in this case, classifying two weight-reducing drugs, phendimetrazine and phentermine, as "controlled substances" -- involved an unconstitutional delegation of power; that the standards used to implement that delegation were so vague and inadequate as to render any conviction violative of Due Process; and that, in any event, such standards were not adhered to.* The court denied the motion in an opinion dated May 26, 1976. Clearly,

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*Pursuant to a stipulation entered into between all the parties, dated April 16, 1976, and signed by the court, it was agreed that all motions, affidavits, memoranda, etc., submitted in connection with the original indictment were deemed submitted in respect to the superseding indictment upon which Pastor was subsequently tried.

the questions raised are fundamental to our system of justice, apparently involve issues of first impression, and if appellant is correct, require that the statute be struck down and the indictment dismissed.

Delegation of Power

In 1970, Congress enacted the Drug Abuse Prevention and Control Act (21 U.S.C. §§801 et seq) in an effort to comprehensively deal with the drug problem in the United States. See 1970 U.S. Code Cong. and Adm. News, pp. 4566-4614. In addition to establishing five schedules containing lists of numerous drugs sought to be controlled by serious criminal sanctions (21 U.S.C. §812), Congress delegated to the Attorney General the power to add new drugs to the lists, thereby subjecting the user, under certain circumstances, to criminal prosecution (21 U.S.C. §811). By delegating to the nation's chief law enforcement official the power to define a crime and ordain its punishment, Congress infringed on the doctrine of separation of governmental powers by delegating legislative power in violation of Article I of the Constitution.

In the instant case, the defendants were charged and convicted of unlawful activities in connection with phendimetrazine and phentermine, two weight-reducing drugs. Neither substance was among the multitude of substances listed by Congress in the

legislation under which the defendants' prosecution was predicated. The substances were added to the schedules (Schedules III and IV) on June 15, 1973 and July 6, 1973, respectively, not by Congressional amendment, but by the official act of the Attorney General.

As a general proposition, Congress may lay down overall policies and standards, while leaving to selected agencies the power to fill up details and make subordinate rules. United States v. Grimaud, 220 U.S. 506 (1911); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Springer v. Government of the Philippine Islands, 277 U.S. 189 (1928). But by the same token, Congress may not delegate to any agency -- here, the highest prosecutorial agency in the country -- the power not merely to establish rules and details pursuant to the overall legislative purpose, but to criminalize conduct that had previously been innocent, and to impose severe penalties for that conduct. For it is the exclusive authority of the legislature to define crimes and fix the penalty. United States v. Wiltberger, 5 Wheat. (U.S.) 76, 95 (1820) ("It is the legislature, not the court, which is to define a crime, and ordain its punishment").

Thus, in two cases where delegations of legislative power

were challenged, each involving modest criminal sanctions for violations, the Supreme Court struck down as violative of the Constitution the abdication of the legislative prerogative. Panama Refining Co. v. Ryan, supra; Schechter Poultry Corp. v. United States, supra; see also Springer v. Government of the Philippine Islands, supra. In those cases, the court laid down the guiding principle of constitutional law:

> "The Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national Legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility. But the constant recognition of the necessity and validity of such provisions and the wide range of administrative authority which has been developed by means of them cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained" Panama Refining Co. v. Ryan, supra at 421; Schechter Poultry Corp. v. United States, supra, at 530.

To be sure, under narrow circumstances, the Supreme Court has upheld a delegation by Congress to an administrative agency

to establish rules and regulations necessary to its effective functioning, the violation of which could be punished by fine or imprisonment fixed by Congress. United States v. Grimaud, supra. In Grimaud, pursuant to legislation creating certain forest reservations in the United States, Congress delegated to the Secretary of Agriculture the authority to make rules and regulations relating to the establishment and management of these reservations. Certainly with regard to matters of "administrative detail," such as grazing and pasturage rights on the different types of properties, "it was impracticable for Congress to provide general regulations for these various and varying details of management." Id. at 516. Needless to say, the line separating legislative power to make laws from administrative authority to make regulations is frequently difficult to define. As the Supreme Court observed:

> "The line has not been exactly drawn which separates those important subjects which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.
>
> From the beginning of the government, various acts have been passed conferring upon executive officers power to make rules and regulations, - not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions 'power

> "to fill up the details' by the establishment of administrative rules and regulation the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress, or measured by the injury done" United States v. Grimaud, supra, at 517.

But the delegation involved here can scarcely be characterized as authorizing a concerned agency to fill up details regarding minor matters of little importance. Nor is the delegation at issue directed to an agency with functions involving the control of drugs and pharmaceuticals, such as the Department of Health, Education and Welfare, empowering that agency to "fill up details" relating to the overall legislation.* Rather, here the nation's most powerful prosecutorial office has been delegated the authority to create new crimes addressed to conduct previously blameless, such as the transactions herein involving weight-reducing pharmaceuticals, and depending on the discretionary classification, to fix substantial prison terms for violations. And, of course, the same official who has created these hitherto unknown crimes is also charged with prosecuting the offenders. This concentration of power in a prosecutor has never been known before in our system of justice.

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*The Secretary of Health, Education and Welfare does have preliminary and advisory functions in this area, but under 21 U.S.C. §811, it is the Attorney General, and no other official, to whom the power involved here has been delegated.

Indeed, the magnitude of such power may be fully appreciated when one considers the potential for punishment involved -- from five years imprisonment to a mandatory term of twenty years. 21 U.S.C. §§841(b)(1)(B), 845, 848. Classification in Schedules I and II involve even higher penalties.

The self-same claim was raised in two recent federal cases, United States v. Westlake, 480 F.2d 1225 (5th Cir. 1973) and United States v. Jones, 480 F.2d 954 (5th Cir. 1973), cert. denied, 414 U.S. 1071 (1973). In those cases, however, the defendants were convicted of crimes involving drugs already classified on the schedules enacted by Congress; the drugs were neither added to schedules nor reclassified by the Attorney General and, hence, the defendants had not been affected by the delegation of authority embodied in the statute. United States v. Westlake, supra, at 1226; United States v. Jones, supra, at 960. However, it is interesting that neither federal court dismissed the claimed infirmity of delegation as meritless, thereby suggesting that the issue was considered of sufficiently serious moment to warrant full and thorough consideration in an appropriate case, as is the case at bar.

One appellate court, however, recently was confronted with exactly the same issue raised here, and struck down as unconstitutional that statute's purported delegation of power. In

Howell v. Mississippi, 300 So.2d 774 (Sup. Ct. of Miss. 1974), the court reversed a conviction for possession of amphetamines in violation of a state statute which, the court noted, was "similar to Title 21, Section 811 U.S.C. (1970), one of the differences being that the authority to reschedule substances in the federal statute is vested in the Attorney General of the United States, whereas the Mississippi act vests the authority in the State Board of Health." Id. at 777. Pursuant to that statute, the State agency had transferred the substances administratively from state Schedule III to state Schedule II, with a corresponding increase in punishment. Addressing the claim that the statute unconstitutionally delegated legislative power to define crimes and fix punishment in contravention of the doctrine of separation of powers, the court ruled at 781:

> "We hold that the authority to define crimes and fix the punishment therefor is vested exclusively in the legislature, and it may not delegate that power either expressly or by implication, but must exercise it under Article 4, Section 33 of the Constitution. We further hold that the attempted delegation of power to the State Board of Health is contrary to Article 1, Sections 1 and 2 of the Constitution providing for separation of the powers of the government of the state into three departments. The State Board of Health is an administrative agency and as such is a part of the executive department of the state. When it rescheduled amphetamines from Schedule III to Schedule II, it increased the punishment of Howell in excess of that fixed by the legislature and thereby exercised legislative power. This infringes on the separation of the powers of government and is prohibited."

While this ruling was grounded upon the state Constitution, the broad language clearly refers to the doctrine of separation of powers generally, and not to any limiting language in that state's Constitution. Moreover, the court specifically referred to the Westlake and Jones cases as raising the identical issue, noting that unlike those cases, the question of the constitutionality of the delegation "is squarely before this court because Howell's sentence was increased as a result of the action of the State Board of Health in transferring amphetamines from Schedule III to Schedule II." Id. at 777.

Further, while in Howell the delegation was to a regulatory agency charged with civilly administering an area of properly controlled activity that might ultimately require referral to a prosecutor to secure obedience to its administrative rules, here the delegation is to the nation's chief prosecutor himself. Accordingly, the cases of White v. United States, 395 F.2d 5 (1st Cir. 1968), cert. denied, 393 U.S. 928 (1968) and Iske v. United States, 396 F.2d 28 (10th Cir. 1968), cited by the court below, are readily distinguishable as they involved the adequacy of standards for administrative action by the delegated agency, the Department of Health, Education and Welfare, pursuant to 21 U.S.C. §301 et seq of the Federal Food, Drug and Cosmetic Act. Of course, the delegations in those cases were not to the Attorney General.

Moreover, the distinction between delegation to an administrative agency and delegation directly to a prosecutor is sharply pointed out in 21 U.S.C. §335, of the provision of the Act under which the White and Iske cases arose. That section states:

> "§335. Hearing before report of criminal violation. Before any violation of this chapter is reported by the Secretary to any United States Attorney for institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given appropriate notice and an opportunity to present his views, either orally or in writing, with regard to such contemplated proceeding."

In the Drug Abuse Act in question here, there is no counterpart to the above provision. Here, the Attorney General has the authority to criminalize acts and immediately prosecute them without affording the accused any recourse to civil proceedings. To be sure, as in Grimaud, supra, criminal recourse was provided to the agency to support its administrative functions. But that is a far cry from the situation here where the Attorney General himself determines what conduct should be prosecuted, criminalizes such conduct and then prosecutes violators.

In the face of years of judicial action designed to restrain and control police and prosecutors, the 1970 Drug Abuse Prevention and Control Act lodged a diversity of powers

of a police prosecutor nature in the Attorney General. Among other things, the Attorney General has subpoena power independent of a Grand Jury (21 U.S.C.§876), may designate whom may carry firearms, execute warrants, arrest without warrants, or seize property (21 U.S.C. §878), and to make or veto immunity requests (21 U.S.C. §884). Such massing of power should not be fused with the power to determine what conduct shall be criminal and how severely it shall be punished.

Nor may it be urged that rapid technological developments make it imperative that such matters be delegated to administrative agencies. See White v. United States, supra, at 9-10; Iske v. United States, supra, at 31. Surely it does not seem an undue burden on Congress after having received information from a concerned agency to amend the law to add or reclassify substances. Any delay occasioned would be no greater than that involved in the instant case. Too, considerations of administrative convenience or expediency, while understandable, should not be condoned where the effect is to undermine constitutional safeguards and individual rights. See Lambert v. California, 355 U.S. 225, 229 (1957); Morisette v. United States, 342 U.S. 246, 263 (1952).

Finally, in the context of this concentration of law-making and prosecutorial power in the hands of the same official, the utilization of the doctrine of conspiracy raises disturbing

prospects. See Other Recommendations of Senior Circuit Judges, 1925 Att'y Gen. Ann. Rep. 5-6; Moscowitz, Some Aspects of the Trial of a Criminal Case in the Federal Court, 3 F.R.D. 380, 392 (1944); O'Brian, Loyalty Tests and Guilt by Association, 61 Harv. L. Rev. 592, 599-602 (1948). As the instant case dramatically demonstrates, the prosecutor's reliance upon the conspiracy concept through the testimony of unindicted co-conspirators suggests an awesome web; a crime created by the Attorney General, charged and prosecuted by the Attorney General, and proved by the self-serving testimony of involved witnesses whose liberty is dependent upon the discretion exercised by the Attorney General.

Unconstitutionally Vague Standards

Apart from the illegitimate delegation of power, the standards contained in 21 U.S.C. §811 et.seq. to guide the implementation of that delegation are so vague and imprecise as to render any conviction thereunder violative of Due Process.

The law is settled that while Congress may delegate rule-making power, it must declare its policy with sufficient clarity and with definable standards to establish clear and definite guidelines to permit the administrative agency to fulfill the legislative mandate. Panama Refining Co. v. Ryan, supra; Schechter Poultry Corp. v. United States, supra; Allegheny Airlines v. Village of Cedarhurst, 132 F. Supp. 871 (S.D.N.Y. 1955), aff'd. 238 F.2d 812 (2d Cir. 1956). Otherwise, the

legislature in effect abdicate its lawmaking function to the agency.

The guidelines established by Congress to be utilized in determining the scheduling of drugs here do not meet the constitutional test. The schedules delineated in 21 U.S.C. §812 are graduated depending upon a drug's potential for abuse, medical usefulness and potential for producing physical or psychological dependence. 21 U.S.C. §811(b) requires that the Secretary of Health, Education and Welfare make recommendations to the Attorney General before a drug can be added, transferred or removed from any schedule, and further requires that he consider the eight factors set forth in 21 U.S.C. §811(c) in so doing. The eight criteria with respect to each drug or substance to be considered are:

> "(1) Its actual or relative potential for abuse;
>
> (2) Scientific evidence of its pharmacological effect, if known.
>
> (3) The state of current scientific knowledge regarding the drug or other substance.
>
> (4) Its history and current pattern of abuse.
>
> (5) The scope, duration, and significance of abuse.
>
> (6) What, if any, risk there is to the public health.

(7) Its psychic or physiological dependence liability.

(8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter."

Primary to the inclusion of a drug in any schedule is a finding of "potential for abuse." But nowhere in the statute is "potential for abuse" defined. See Schechter Poultry Corp. v. United States, supra ("fair competition" not a sufficiently clear standard). This lack of guidance in relation to such a critical concept is indicative of the unclear standards under which the delegatee is empowered to act. For example, could the Attorney General place liquor or tincture of iodine on one of the schedules by determining that these substances have potentials for abuse?

Significantly, the inadequacy of the above standards was recognized by a high official in the Bureau of Drugs of the Food and Drug Administration. For in an internal memorandum dated December 20, 1972, Dr. Henry E. Simmons pointed out the woefully inadequate guidelines used to schedule the drugs (A100-10). In evaluating the criteria used, Dr. Simmons stated:

> "These eight factors unfortunately are for the most part vague and redundant. The list exhibits circular reasoning and lack of parallelism, particularly when viewed together with the definitions of the schedules. Most importantly, the list of factors and the definitions of the schedules leave undefined the concepts of drug abuse potential,

> of drug dependence, and of risk to public health. In short, the factors provide little practical guidance in deciding particular cases" (A102-3).

The memorandum goes on to establish its own definitions for the relevant terms, and to set up its own criteria to be used in scheduling drugs.

Thus, it is clear that the guidelines established by Congress have been found, pragmatically, to be insufficient, so much so that they apparently have been superseded by administrative fiat. This is precisely the evil that the proscriptions against imprecise and indefinite delegations of authority seek to prevent. Nor is it relevant that the superseding guidelines may or may not be sufficiently precise and definite, or in the public interest. "The point is not one of motives but of constitutional authority, for which the best of motives is not a substitute." Panama Refining Co. v. Ryan, supra at 420.

Failure to Adhere to Standards

In any event, the above eight factors which, according to 21 U.S.C. §811(c) the Attorney General must consider in determining whether to add or reschedule drugs, were not, in fact, adhered to. In the first place, with respect to phendimetrazine and phentermine, unwarranted and irrelevant considerations led to the scheduling of these substances. For instance, during a preconference hearing on the scheduling of

phentermine, Administrative Law Judge William E. Brennan, ruling on Pennwalt Corporation's request for discovery of certain materials, expressed his concern over the apparent reliance by the Attorney General on consents by interested parties to placement of proposed drugs in certain schedules in lieu of consideration of all of the factors that Congress expressly declared were to be considered (A134-6).

> "I do not read Section c as a grant of discretionary power: I read it as a limitation of discretion, because the Attorney General -- the Administrator, is directed that he must consider the eight elements there enumerated.
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> ***
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> "During argument and consideration of the briefs, I have become concerned with what appears to be the practice of the Administrator to allow interested parties which may have a drug being proposed for scheduling to consent to the placement of the proposed drug on a certain schedule. I see no authority for such an action in the Act: I think the Act is clear. I think the Administrator must make the finding set forth in Sections 201 and 203 of the Act.
>
> "I think the Congress has clearly set forth the factors which the Administrator must consider. Congress has not stated that equal weight to every such factor of the eight must be assigned, but the Administrator must consider those factors, and after a consideration of those factors, plus the recommendation of the Secretary of HEW as it relates to scientific and medical evaluations, then the Administrator must compare the evidence that he has on a proposed drug with the evidence he has used and upon which

> he has concluded to place drugs in schedules 1 through 5" In the Matter of: The Proposal to place the drug Phentermine in Schedule III of the Comprehensive Drug Abuse Prevention Control Act; (P.L.91-513), 21 USC 801 et.seq.) (Pennwalt Corporation), Drug Enforcement Administration Docket No. 73-16, Hearing Minutes pp. 103-104, December 10, 1973.

Clearly, Judge Brennan's concern that the Attorney General was lax in considering the factors enumerated in 21 U.S.C. §811(c) is well founded. The record is clear that before proposing the scheduling of phendimetrazine and phentermine on May 1, 1973, and before actually scheduling those drugs in June and July, 1973, the items available to be considered by the Attorney General were sparse (A35-43). Moreover, in scheduling the drugs, the Government appeared to allow pragmatic considerations of its own to influence its classification decisions. For example, the Attorney General delegated much of his criminalizing authority to the Bureau of Narcotics and Dangerous Drugs (BNDD)(A56-9). However, as the record shows, that agency, in order to reduce manpower needs, sought to eliminate hearings because of the extensive work that would require (A78-89). Aside from manpower considerations, other considerations included the possibilities of a manufacturer of a drug requesting a hearing, the chances of the BNDD prevailing in such a hearing and the relative cost of control of such drugs (A78-89).

Sound restrictions imposed on Congress's ability to delegate authority and the necessity for rigid standards of guidance accentuate the necessity for strict adherence by the delegatee to the Congressional mandate. When irrelevant considerations such as those mentioned above enter into the decision-making process, acts made criminal as a result of that delegation violate fundamental Due Process guarantees.

Furthermore, aside from irrelevant considerations, it is clear that not all of the factors listed in 21 U.S.C.§811(c), which Congress mandated the Attorney General to consider, were in fact considered. The materials relied upon in scheduling phendimetrazine and phentrimine are described in the record (A37-44). Nowhere in any of the materials concerning both drugs is there a single specific finding concerning any of the eight factors which must be considered (A39,A44). All that is presented is a compilation of unsynthesized raw data, and it is absolutely clear from that data that not all of the factors -- indeed, at best only a small percentage -- could have been relied upon in making the scheduling determinations (A35-6, A37-9).

In response to the defendant's contention below that the Government failed to consider the above eight factors in scheduling the drugs in question, an official of the Food and

Drug Administration, William W. Vodra, submitted an affidavit which was totally ineffective in answering the defendant's contentions. For example, in support of the contention that "potential for abuse" was documented, the Vodra affidavit has annexed to it, as Exhibit 3 (A158-204), a compilation of BNDD staff analyses of abuse and potential for abuse. Among those memoranda is one including fifteen pages of what is apparently a computer print-out of weekly laboratory analyses of phendimetrazine done by BNDD's Laboratory Division during a portion of 1972. While at first glance this might be considered a significant indicia of abuse or abuse potential, a closer analysis reveals that the fifteen pages consist of only three <u>different</u> pages, and twelve pages which are <u>exact copies</u> of one of the other three. Even on the three distinct pages there are recorded only five separate cases of what might be considered abuses with a total of 48 tablets involved.

According to Vodra's affidavit, the critical input from the Food and Drug Administration to BNDD occured in a meeting on March 30, 1973 when, allegedly, important scientific and medical information concerning anorectic drugs was considered. No transcript, memoranda or written notes of that meeting apparently exist. It was allegedly because of the reliance by BNDD on the unrecorded conclusions at this March 30th

meeting that the Attorney General determined that sufficient evidence existed to place the drugs in question in Schedule III. The result then, is that based on unrecorded evidence and unrecorded findings, the Government determined to add certain drugs to the list of prohibited items. And based only upon the Government's affidavit below, the court determined that there was no showing that the Attorney General abused his discretion in deciding to schedule the drugs. The court below concluded that no hearing on the issue was necessary, since such a proceeding would probably confirm and amplify everything contained in the Government's affidavit (A442). Certainly when Congress delegated to the Attorney General the authority and power it did, Congress did not intend to delegate an unbridled discretion to act. Such a result appears to have occurred in the instant case, as decisions which resulted in major criminal sanctions are shown to have been based upon unrecorded and unreviewable presentations which the court below considered sufficient as to make further inquiry unnecessary.

POINT III

Venue was improperly laid in the Southern District.

On February 12, 1976, in response to defendant Pastor's motion addressed to the question of venue, the court ruled that disposition of such motion would depend on a resolution of factual issues to be determined after trial. Accordingly, at the conclusion of the Government's case, the defendants moved to dismiss the substantive counts, urging, correctly, that the Government offered no proof that venue properly lay in the Southern District of New York as alleged in the indictment (T1934). In opposition to the motion, the Government emphatically stated that its theory of venue was based on telephone conversations between Fernald and the defendants (T1936,T1944,T1951,T1953), although in a memorandum of law submitted the following day, the Government abandoned that theory as the basis for venue and urged, instead, that Fernald, as Pastor's accomplice, committed the substantive crimes in New York and, alternatively, that the violation constituted a "continuing offense" pursuant to 18 U.S.C.§3237(a). The court denied the motion to dismiss, stating:

"The Court's ruling is, the Pinkerton theory is applicable here. Mr. Fernald is a co-conspirator who committed the substantive crimes in New York in the sense that but for the action of Mr. Fernald, the drugs would not have been acquired.

"With respect to Counts 2 and 3, he actually took these drugs from the Wingate inventory and with respect to Counts 4, 5 and 6, he placed a telephone call or mail order to Vitarine pursuant to which the drugs were acquired by the co-conspirator and under the Pinkerton theory, Pastor and Weiner could be convicted of those substantive counts because they are named in the counts and those are acts committed in furtherance of the conspiracy. They are also substantive crimes.

"As an alternative ground, the Court adopts the view set forth by the Government in its memorandum handed up this morning" (T1995-6).

And in its charge to the jury, and over the Government's insistence that the court was inadvertently confusing the issue of venue with the question of Fernald's criminal status vis-a-vis Pastor (T2326-8),* the court again articulated the

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*After much colloquy on the point, the Assistant United States Attorney stated (T2332):

"May I just point out to your Honor that everybody has objected to the charge on aiding and abetting and the Pinkerton charge and for the same reasons, and I would ask the Court to reconsider that matter. I think we are creating an appellate issue...."

"Pinkerton theory" as sufficient to fix venue (T2313), and, alternatively, that venue could be established if Pastor was found to have "aided and abetted Fernald" (T2315). The defendants excepted to these instructions (T2331-2).**

The evidence as to the substantive counts, briefly, showed that with regard to counts two and three, to which the jury failed to reach a verdict, Fernald personally delivered the drugs to Pastor in Philadelphia pursuant to telephone arrangements (T493-7, T500-03). The drugs apparently came from Fernald's inventory in New York (T493-4).

** Related to the court's erroneous merging of the concepts of venue with accomplice liability was the problem of Fernald's precise role in the alleged transactions, which vexed the Government from the beginning of the trial. In the indictment and its bill of particulars, the Government consistently maintained that Pastor and Weiner attempted to evade the requirements of the federal drug laws by "falsely represent(ing) to co-conspirators Charles Fernald and others that they were ordering the phendimetrazine and phentermine for a Dr. Horace Johnson." The trial court, however, in seeking to sustain venue of the substantive counts in the Southern District, was forced to maintain that it was Fernald himself who acquired the drugs by misrepresentation (T1989, T2321), and that since he was not the victim of the misrepresentation, as per the Government's theory, then the victim had to be the Government of the United States (T2322). Needless to say, the court's instructions were admittedly confusing to both the prosecution and the defense (T2326-32) and as the record clearly indicates by virtue of their questions, to the jury as well (T2359, T2362-5, T2365-76).

As to count four, to which the jury also failed to reach a verdict, the proof showed that pursuant to telephone calls, Fernald ordered a quantity of drugs from Vitarine, a Queens drug manufacturer, which shipped the merchandise directly to Pastor in Philadelphia (T700, T702, T706). Although of no consequence, there was no evidence as to the delivery route.

Similarly, as to counts five and six, upon which the jury returned guilty verdicts, Vitarine shipped drugs to Pastor in Philadelphia pursuant to Fernald's orders, including mailing copies of letters purportedly prepared by Pastor under Dr. Johnson's signature (T712-16, T722, T728, T734, T743, T750, T754, T759-60, T762). All payments were made in Philadelphia (T724, T730-01, T736, T744, T754-5, T759-60, T764).

Therefore, with regard not only to the substantive counts upon which they were convicted, but upon the other substantive counts as well, neither Pastor nor Weiner performed any act in the Southern District of New York. Indeed, the only acts shown to have been performed by co-conspirator Fernald in the Southern District were some telephone calls to Pastor and Weiner in Philadelphia, removing drugs from his inventory (counts 2 and 3) and ordering drugs from Vitarine

(counts 4, 5 and 6).

The cases have consistently stressed that questions of venue in criminal matters are not mere procedural technicalities but raise serious issues deeply rooted in constitutional jurisprudence and public policy. Travis v. United States, 364 U.S. 631, 634 (1961); United States v. Cores, 356 U.S. 405, 407 (1958); United States v. Johnson, 323 U.S. 273, 276 (1944); United States v. Rodriguez, 465 F.2d 5,9 (2d Cir. 1972); United States v. Walden, 464 F.2d 1015, 1017 (4th Cir. 1972); United States v. Sweig, 316 F. Supp. 1148, 1161-1162 (S.D.N.Y. 1970). Article III, Section 2 of the Constitution of the United States declares that trials "shall be held in the State where the said Crimes shall have been committed." The Sixth Amendment amplifies this provision, stating that defendants in criminal cases shall be tried in the "district wherein the Crime shall have been committed." The Supreme Court emphasized:

> "Questions of venue in criminal cases . . . are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed. If an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it." United States v. Johnson, supra at 276.

These constitutional and policy considerations "were designed for the benefit of the accused in criminal trials" (United States v. Walden, supra, at 1017), and even doubtful questions of venue should be resolved in a defendant's favor. United States v. Sweig, supra, at 1161-1162. In the case at bar, there is not the slightest doubt as to the impropriety of venue in the Southern District.

In the first place, while the continuing offense theory of venue (18 U.S.C. §3237) was lamely argued by the Government (see Government's Memorandum of Law adopted by court in its opinion at T1995-6), this theory was later discarded, and the court did not even attempt to articulate that theory to the jury, for that theory relates to crimes involving movement in more than one place (United States v. Barnard, 490 F.2d 907, 910 (9th Cir. 1974); United States v. Walden, supra, at 1018), or, as the Supreme Court put it, "wherever the wrongdoer roamed," (Travis v. United States, supra, at 634), and whose locale "shall extend over the whole area through which force propelled by an offender operates." United States v. Johnson, supra, at 275. Such crimes usually are defined to include movement as the essence of the offense, as in cases of kidnapping (United States v. Barnard, supra, at 910), or where the definition of the crime explicitly involves transportation in interstate or foreign

commerce. See United States v. Barnard, supra; United States v. Coppola, 486 F.2d 882 (10th Cir. 1973); United States v. Polizzi, 500 F.2d 856 (9th Cir. 1974).

By contrast, the continuing offense theory is inapplicable where the offense involves "a single act which occurs at one time and at one place in which only it may be tried, although preparation for its commission may take place elsewhere.." United States v. Bozza, 365 F.2d 206, 220 (2d Cir. 1966) quoting Reass v. United States, 99 F.2d 752, 754 (4th Cir. 1938); United States v. Sweig, supra at 1160. Those offenses that are complete when the act is performed include filing a false document (Travis v. United States, supra), uttering a forged instrument (United States v. Rodriguez, supra), unlawfully entering a bank (United States v. Walden, supra), appearing before an agency (United States v. Sweig, supra), and receiving stolen property (United States v. Bozza, supra).

The crime involved in the instant case is unlawfully obtaining certain drugs by fraud. As in Bozza and Rodriguez, the crime involves a single act, i.e., obtaining the drugs. It was not the legislative intent under the explicit language of 21 U.S.C. §843 to authorize venue wherever a wrongdoer covered by the statute chanced to travel.

The other two theories which the court below adopted -- accessoryship and aiding and abetting -- equally involve impermissibly "expansive notions of venue". United States v. Sweig, supra at 1160. To reiterate, the record is perfectly clear that the only acts committed in the Southern District were telephone calls between Fernald and the defendants, and Fernald's ordering the drugs from Vitarine. The defendants performed absolutely no acts themselves in the Southern District. Moreover, although the court attempted to reconstruct the Government's theory of the case in an effort to salvage venue in the Southern District, and over the Government's objection, the proof showed that Pastor was the principal and Fernald his accessory. On these facts, the cases inescapably underscore the court's error.

Thus, in United States v. Bozza, supra, a case squarely on point, this Court dismissed a count for improper venue where the principal was prosecuted in the district where his accessories committed acts, even though the principal performed no acts there himself. Said this Court at 221:

> "Congress seems to have been content with venue where the defendant's own accessorial acts were committed or where the crime occurred, without providing still another where the accessorial acts of agents took place."

The same reasoning was applied in United States v. Sweig, supra, which relied on Bozza, to dismiss a count for improper venue. While the court in Sweig did not question the proposition that venue may lie as to the accessory where the principal is claimed to have committed the wrongful act (i.e., Fernald could have been tried in a district in Pennsylvania where Pastor and Weiner were alleged to have committed crimes), "the attempt to turn the proposition around is not only dubious as a matter of logic; it is also bad law." Id. at 1160. The court went on at 1161:

> "It is true that an accessory may be prosecuted both in the place where the principal commits the crime and in any different place "where defendant's own accessorial acts [are] committed * * *." United States v. Bozza, supra at 221. But, as is demonstrated by the opinion from which the last-quoted language comes, and upon which the Government erroneously relies here, this does not authorize prosecution of the principal in a venue different from that in which the crime occurs merely because this different venue is the location of "accessorial" conduct by such a principal."

Another court used even stronger language to condemn as unfair the use of the conspiracy theory to manipulate venue:

> "At least one principal is essential, and when all who allegedly participate are in fact principals there is a degree of absurdity in proceeding against them all as accessories for purposes of choice of jurisdiction. It makes sense to bring an accessory to the place of trial of his principal; it is nonsense to reverse the procedure and serves no purpose of which we are aware except to further facilitate the prosecution of conspiracy cases and to combine such a prosecution with the prosecution of substantive offenses." United States v. Walden, supra, at 1020.

While recognizedly the challenge to venue herein relates primarily to the substantive convictions, albeit the basis for venue on the conspiracy charge is exceedingly thin, there are compelling reasons of logic and fairness to dismiss that count as well. Whereas here five counts in a six-count indictment lay venue improperly, and then seek to tie those improperly-based counts into an overall conspiracy theory, with the entire package loosely tied together under instructions that were not only patently erroneous but also totally confusing, the conviction for conspiracy should also be reversed. Those courts expressing misgivings at the misuse frequently made of the conspiracy doctrine would find in the instant case a glaring example of manipulating the law of conspiracy to deprive the defendants of their constitutional rights to be prosecuted in the district where the crime was committed. Thus,

"A decision by the United States to prosecute for conspiracy is not without some advantage to the government. See Hyde v. United States, 225 U.S. 347, 384-391, 32 S.Ct. 793, 56 L.Ed. 1114 (1912), (Holmes, J., dissenting), and Krulewitch v. United States, 336 U.S. 440, 446-458, 69 S. Ct. 716, 719-725, 93 L.Ed. 790 (1949), (Jackson, J., dissenting). To add to the advantages already existing by engrafting a forum shopping option as to substantive offenses would, we think, go too far. To repeat, venue is not mere formalism. The right to a trial before a jury of the vicinage is fundamental and such a trial ought to be held at the place of commission of the substantive offense. The Sixth Amendment may not be ignored, and we think that a dubious theory of accessoryship of the very principals who commit the substantive offense or an illogical theory of continuing crime should not be allowed to undercut it." United States v. Walden, supra, at 1020.

POINT IV

Pursuant to Rule 28i of the Federal Rules of Appellate Procedure, appellant Pastor adopts by reference all points raised on appeal by appellant Weiner.

CONCLUSION

The judgment of conviction should be reversed and the indictment dismissed or, alternatively, a new trial should be ordered.

Respectfully submitted,

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Brief is admitted this
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